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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1242

MORRIS S. BROMBERG AND
HOLIDAY LODGE, INC.,
Plaintiffs-Petitioners,

vs.

HOLIDAY INNS OF AMERICA AND
HIOA, INC.,
Defendants-Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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OPINIONS BELOW.

The opinion of the United States District Court is reported in 278 F. Supp. 417 (N. D. Ill. 1966).

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 388 F. 2d 639 (7th Cir. 1967).

STATEMENT OF THE CASE.

The respondents accept the facts as stated by the courts below. This record presents a situation in which, in the period between March and May of 1962, Holiday Inns

offered to grant petitioners a franchise if Bromberg was able to "straighten out his financial affairs" (Petition 5a). As the record further shows, Bromberg was unable to meet these conditions when First Federal Savings & Loan Association of Chicago proceeded to foreclose its mortgage. It was not until more than one year later that Holiday Inns purchased the motel from First Federal after the latter had obtained title in a foreclosure sale (Petition, 9a-10a; 20a-21a). With respect to one of the allegations of petitioners the Court of Appeals noted: "It is pertinent to observe that there is not even a hint of collusion between First Federal and Holiday Inns" (Petition 10a).

As demonstrated by the opinions of the courts below the only issue between the parties on this record is whether or not the facts establish the existence, under Illinois law, of a fiduciary relationship between petitioners and respondents. The trial court held that they did not and, after observing the witnesses at trial, stated that "there would be no warrant for imposing a constructive trust upon the basis of a record so lacking in substance" (Petition, 24a). The Court of Appeals sustained the factual findings of the District Court and held that the facts did not create a fiduciary relationship and that "even though we assume, contrary to what we hold, that Holiday Inns was under a fiduciary obligation to plaintiffs by reason of the unaccepted proposal contained in its March 14, 1962 letter, such obligation was extinguished when it became known by all parties that First Federal would proceed with its mortgage foreclosure" (Petition, 10a).

The statement of the case presented on pp. 3-9 of the Petition for a Writ of Certiorari in this Court adopts certain of the facts found by the courts below but it also argues inferences and innuendoes which were rejected by the courts below and which are not supported by the record in this case. For example, in the various references to

Howard Carlson (Petition, p. 5), the petitioners seek to create the impression that Carlson, in some manner, represented respondents in their dealings with the petitioners in this case. These statements fly in the face of the finding of the District Court (Petition, p. 17a) that: "There is nothing in the record to indicate that he [Carlson] was ever an officer, director, or agent for Holiday Inns, or that he represented them in any of his dealings with Bromberg."

Another example of unsupported innuendo is petitioners' assertion that following the May, 1962 meeting at First Federal "Holiday Inns, without notice to Bromberg broke off negotiations with him and *sub silentio* withdrew its offer for franchise (A. 8a, 9a) and determined to acquire the motel for itself" (Petition, p. 7). This asserted "factual" statement is nowhere supported in this record and is contrary to the finding of the Court of Appeals that "after that meeting it was known to a certainty by all parties that First Federal would proceed with its mortgage foreclosure, thereby rendering it impossible for Bromberg to meet the conditions set forth in the March 14 letter" (Petition, p. 8a) and thus terminating the outstanding franchise offer and ending the negotiations.

Another incorrect statement is found on pages 7-8 of the Petition which purport to reflect the record with respect to Bromberg's efforts to obtain financing through Rawson. Petitioners imply that Bromberg found alternative financing and that Wilson and Ladd refused to talk to Bromberg. The trial court found:

> "They [Wilson and Ladd] were emphatic in denying that they attempted to avoid Bromberg's efforts to reach them. In any event, Bromberg admittedly did not write to either Wilson or Ladd to inform them of his alleged alternate financing offer. And it is undisputed that Rawson did not obtain a *commitment* 'from any source and however informal, to pay to First Federal the moneys First Federal had demanded at

the meeting through Mr. Cavanaugh.' (Quotation of part of question asked to (sic) Bromberg at trial. As to whether he had obtained such a commitment he answered 'No sir.' Tr. 224-225A)." (Petition p. 20a.)

The Court of Appeals concurred:

"Plaintiffs devote considerable effort designed to show Bromberg's good faith in attempting to obtain refinancing funds. We see no point in discussing this phase of plaintiffs' case because Bromberg received no definite commitment from any source and, as he admitted on cross-examination, he never 'obtained a commitment from any source and however informal, to pay the First Federal the monies' owing on the mortgage debt." (Petition, p. 6a).

As demonstrated by the above examples (contrary to the representation on page 3 of the Petition for Certiorari) there were serious factual disputes between the petitioners and the respondents. What the Petition ignores is that all of them were resolved in respondents' favor by both of the courts below.

REASONS WHY THE WRIT SHOULD BE DENIED.

The courts below have held, on the facts in this record, that no fiduciary relationship existed between the parties hereto, and that, even if it be assumed, *arguendo,* that some such relationship once existed, it terminated more than a year prior to the time when the motel was purchased by respondents from First Federal Savings & Loan Association of Chicago. This determination was made by the trial court upon the facts disclosed at trial and was affirmed by the Seventh Circuit. Petitioners now seek to reargue the facts in this Court.

Throughout this litigation there has never been a serious dispute between the parties as to the applicable Illinois law in this diversity action. Petitioners have argued that a fiduciary relationship existed based upon their factual version of the over-all relationship between the parties, which includes an unsupported assertion that confidential information was disclosed to respondents, and they have also argued that a fiduciary relationship existed because, they assert, the March 14, 1962 letter was a joint venture contract.

At the trial petitioners sought to avoid the legal requirement that a party seeking to establish the existence of a fiduciary relationship must prove the existence of that relationship "by proof, clear, convincing, strong, unequivocal and unmistakable so as to lead to but one conclusion." *Clayton* v. *Clow & Sons,* 327 F. 2d 382, 389 (7th Cir. 1964) (applying Illinois law). They argued that the March 14, 1962 letter (Plaintiff's Exhibit 9, Petition pp. 26a, 27a), constituted a written agreement for a joint venture. The Court of Appeals affirmed the finding of the District Court, contrary to this contention, and stated that the letter "did not create a contract for a joint venture between the parties,

and we might add a contract for any other purpose" (Petition 5a). Petitioners' criticism of the Court of Appeals for applying principles of contract law is unwarranted since it was petitioners who sought to establish a contract for a joint venture as a predicate for a finding that the parties had entered into a fiduciary relationship as a matter of law. The respondents have never contended that fiduciary relationships do not flow from the existence of a joint venture. What petitioners ignore is that the facts in this record do not sustain the existence of a joint venture. Both sides cited the leading Illinois case of *Carroll* v. *Caldwell*, 12 Ill. 2d 487, 147 N. E. 2d 69 (1958) in the courts below. The Seventh Circuit held: . . . "we agree with the District Court that *Carroll* negates rather than supports plaintiffs' contention" (Petition, 11a) with respect to the existence of the alleged joint venture.

With respect to the other thread of petitioners' argument, that the over-all relationship between the parties created a fiduciary relationship as a matter of fact, the District Court held:

> "By relying in their post-trial briefs upon the March 14 letter, plaintiffs evidently realized the futility of trying to prove their case with the other evidence which they adduced. It is far short of the 'clear and convincing' foundation they must build. In our thinking, neither Wilson nor Ladd entered into a fiduciary relationship with plaintiffs. Even the alleged 'confidential' information given to the defendants has not been proven to be so by clear and convincing evidence." (Petition, 25a).

In this Court, petitioners blithely assume, contrary to the record, the existence and the disclosure of confidential information upon which they base their claim of a fiduciary relationship. The facts, however, simply do not support the claimed disclosure of confidential information, and hence

do not support petitioners' claim of the existence of a fiduciary relationship.

It is claimed by petitioners that this case raises "fundamental legal questions regarding the franchisor-franchisee relationship and consequently consideration of this case by this Court will have important general significance." (Petition, p. 11.) Respondents respectfully submit that no issue of that kind is presented by this record. Both of the courts below held that no franchisor-franchisee relationship existed at any time among the parties.

Moreover, no terms of any purported franchise contract between respondents and petitioners appear in this record. Certain terms of a standard Holiday Inns' franchise agreement were described by various witnesses, but the record does not even support speculation as to the other terms thereof.

Respondents readily concede that there are reciprocal rights and duties between a franchisor and a franchisee, some of which are premised upon the franchise agreement and some of which arise by operation of law. However, it is respectfully submitted that there are no facts in this record which would enable this Court to determine what these rights and duties are, much less to determine whether any hypothetical franchisors and franchisees may have entered into a fiduciary relationship.

On pages 17 through 30 of the Petition for Certiorari various cases are cited which set forth the duties of fiduciaries. What is present in each of these cases is the existence of a fiduciary relationship and facts which demonstrate overreaching or inequitable conduct by the fiduciary. No fiduciary relationship and no facts supporting overreaching or inequitable conduct are present in this record.

The factual findings of the courts below are fully supported by this record and Illinois law has been properly applied to the facts in this case. No issue of importance is presented to this Court.

Respectfully submitted,

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